

Declaration of Matthew Durell, Esq.

NOW COMES Matthew Durell and deposes and states as follows:

1.

My name is Matthew Durell. I am over twenty-one (21) years of age and am competent to testify in this matter. Unless otherwise indicated, the facts set forth herein are based upon personal knowledge. I understand that willful false statements are punishable by fine or imprisonment, or both and may jeopardize the validity of the application or any patent issuing thereon.

2.

I am an associate with the law firm of Hill, Kertscher & Wharton, LLP. In that capacity I began representing assignee SportBrain Holdings, Inc. ("SportBrain") in the prosecution of patent application Serial No. 09/757,241 ("the '241 application"), entitled "INTEGRATING PERSONAL DATA CAPTURING FUNCTIONALITY INTO A PORTABLE COMPUTING DEVICE AND A WIRELESS COMMUNICATION DEVICE" (invented by Gardner and Kurobe). I am currently the attorney of record in the '241 application.

3.

In late May 2005, I began preparing a Request for Continued Examination ("RCE") in response to the Final Office Action dated March 17, 2005. In doing so, I attempted to obtain contact information for both named inventors, Mitz Kurobe and Deane Gardner, who are no longer employed by SportBrain. In early June 2005, I was able to obtain email addresses for Gardner and Kurobe and proceeded to send a message to each for purposes of obtaining a declaration under 37 C.F.R. § 1.131 to establish invention of the subject matter claimed in the '241 application prior to the Uchida reference cited by the Examiner in the March

17, 2005 Office Action. In that same email message, I advised both inventors that SportBrain's reply to the March 17, 2005 Office Action was due by no later than September 17, 2005. I further requested that each inventor provide a phone number or other contact information so that I could contact each to discuss the substance and requirements for the declarations.

4.

On June 16, 2005, I had received email responses from both inventors. In his email reply, Mitz Kurobe advised that he now resides in Tokyo, Japan, but did not provide a phone number or other contact information.

5.

Later, on June 16, 2005, I sent a second email to Mitz Kurobe providing (by attachment) copies of the '241 application file materials for his review. At that time, I attempted to arrange a phone conference to discuss the '241 application and the requirements for executing the declaration. Mitz Kurobe did not respond to my June 16, 2005 email.

6.

On August 30, 2005, I sent Mitz Kurobe a third email message advising of the status of the '241 application and reiterating my request for assistance in preparing and executing the declaration of prior invention to be included with the RCE. At that time, I also reminded Mitz of the September 17, 2005 deadline for filing the RCE.

7.

Mitz Kurobe never replied to my August 30, 2005 email or otherwise contacted me to discuss the declaration or advise of his phone or mailing contact information. Therefore, on September 2, 2005, I sent Mitz Kurobe a fourth email message requesting an immediate response regarding whether or not he could provide a declaration of prior invention. That afternoon,

Mitz Kurobe responded via email, advising that he would sign the declaration.

8.

On September 14, I sent Mitz Kurobe a draft declaration and supporting documents for his approval and signature via email. At that time, I requested that Mitz Kurobe confirm receipt of my email and, upon review and approval of the declaration, fax or mail the signed document to me as soon as possible. Having received no receipt confirmation by September 15, 2005, I sent another email to Mitz Kurobe requesting confirmation of his receipt of the draft declaration and reminding him of the September 17, 2005 deadline. Mitz Kurobe never replied to my September 15, 2005 email or otherwise contacted me to provide alternate contact information or discuss the declaration.

9.

On September 16, 2005, having been unable to secure Mitz Kurobe's cooperation in drafting and executing the declaration, I was forced to proceed with drafting the Remarks accompanying the RCE based solely on the declarations of Marina Portnova, Esq. and co-inventor Deane Gardner. As stated in Mr. Gardner's declaration, he is a co-inventor of all claims now pending in the '241 application. The RCE was timely filed on September 19, 2005.

10.

On October 10, 2005, I received the Office Action Mailed October 5, 2005. In an effort to overcome the rejections set forth therein, I contacted the Examiner by phone to discuss the proper method to proceed given Mitz Kurobe's unavailability or unwillingness to cooperate in executing a declaration of prior invention. At that time, the Examiner advised that he would review the file and call me back.

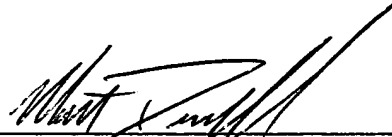
11.

In the interim, on October 18, 2005, I sent another email message to Mitz Kurobe in an attempt to secure Mitz Kurobe's cooperation in executing the declaration. Again, I provided (by attachment) a draft of the declaration and supporting documentation for his review and execution and further requested that he fax the signed document to me as soon as possible. However, to date, Mitz Kurobe has not confirmed receipt of or replied to my October 18, 2005 email and has not faxed or mailed the completed declaration or otherwise contacted me to discuss the declaration or provide alternate contact information.

12.

On October 19, 2005, I received a voice mail message from the Examiner advising that a declaration, signed by me, and documenting failed attempts to secure Mitz Kurobe's cooperation in executing a declaration, would be sufficient to overcome the rejections set forth in the Office Action of October 5, 2005.

I hereby declare under oath and under penalty of perjury that the foregoing statements are true and correct.

A handwritten signature in black ink, appearing to read "Matthew D. Durell", is written over a horizontal line.

Matthew D. Durell
October 27, 2005